82-1235

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES E. LUNA, Petitioner

v.

STATE OF TEXAS, Respondent

On Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Seth S. Searcy III
Counsel of Record

505 W. 14th St.
Austin, TX 78705
(512) 472-3167

Fred Head
Box F.H.
Athens, TX 75751
(214) 675-5111

Attorneys for
Petitioner, Charles
E. Luna

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied due process of law because neither he nor his counsel of record was notified of the submission to the Dallas Court of Appeals of his one appeal of right for review of his conviction?

2. Does rule 204, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, violate due process by permitting submission to and disposition of an appeal by a court of appeals although counsel of record for the appellant is not notified of the submission?

Petitioner notes that 28 U.S.C § 2403(b) may be applicable and accordingly has served copies of this petition on the Texas Attorney General.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Court Rules

TEX. CRIM. APP. R. (1981)

TEX. R. CIV. PROC.

In the

SUPREME COURT OF THE UNITED STATES
October Term, 1983

CHARLES E. LUNA, Petitioner

v.

STATE OF TEXAS, Respondent

On Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner Charles E. Luna respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in the case of Charles E. Luna v. State of Texas, No. 0732-82.

OPINION BELOW

The Texas Court of Criminal Appeals did not write an opinion in this case,

merely refusing Petitioner's petition for discretionary review, and overruling his motion to rehear the denial, pursuant to TEX. CODE CRIM. PROC. ANN. art. 44.45 (Vernon Supp. 1982) and TEX. CRIM. APP. R. rule 304 (1981). Copies of the judgment refusing the petition and order overruling the motion are set out in the Appendix, p. A1.

The intermediate appellate court, the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas, wrote a per curiam opinion (unreported) affirming Petitioner's conviction and a copy of its opinion is set out in the Appendix, p. A2.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals refusing Petitioner's

petitioner for discretionary review was entered on October 13, 1982. Petitioner's timely motion for rehearing was overruled on November 24, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION, STATUTE AND RULES OF COURT INVOLVED

U.S. CONST. amend. 14, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law;
> . . .

28 U.S.C. § 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> . . .
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a

> State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

TEX. CRIM. APP. R. rule 204 (1981); TEX. R. CIV. PROC. ANN. rule 411 (Vernon 1967). Pertinent parts of the cited criminal and civil rules are quoted in the Reasons for Granting the Writ section of this petition.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial, on his plea of guilty, of commercial bribery, a felony, in violation of TEX. PEN. CODE ANN. § 32.43 (Vernon 1974), on July 13, 1979, in the 203rd District Court of Dallas County, Texas. He was sentenced on August 17,

1979, to five years' imprisonment in the Texas Department of Corrections.

After sentencing, Petitioner's trial counsel, Robert C. Hinton, Jr., Esq., informed him that he would not represent Petitioner on appeal without an additional fee. Petitioner believed the $25,000 fee already paid Mr. Hinton covered the appeal and, because the dispute could not be resolved, discharged Mr. Hinton as counsel. Petitioner subsequently retained Fred Head as counsel of record for the appeal, and Mr. Head notified the trial judge, Hon. Thomas B. Thorpe, on January 29, 1980, of Mr. Hinton's discharge and Mr. Head's retention. A copy of Mr. Head's letter to Judge Thorpe is included in the Appendix, p. A24.

Texas amended its constitution in November 1980 to add criminal jurisdiction to its intermediate appellate courts--the former courts of civil appeals--and legislation implementing the amendment and transforming these courts into courts of appeal took effect September 1, 1981.* Although the record in Petitioner's case was approved by the trial court on February 21, 1980, and transmitted to the Dallas Court of Appeals, that Court did not decide Petitioner's appeal until November 1981.

The clerk of the Dallas Court of Appeals docketed Petitioner's appeal and set it for submission but did not

---

*See TEX. CONST. art. V, §§ 5 & 6; TEX. CODE CRIM. PROC. ANN. arts. 4.03 & 4.04, ch. 44 (Vernon Supp. 1982).

notify either Petitioner or his counsel of record, Mr. Head, of the submission date. The Dallas Court heard the appeal without a transcription of testimony at the trial, brief, or oral argument, and affirmed Petitioner's conviction, per curiam, on November 12, 1981.

When Mr. Head learned of the Dallas Court's decision, he filed a motion for rehearing, on November 30, 1981, which the Court overruled--after Mr. Head filed several additional motions and other requests for relief--on March 31, 1982.

Mr. Head timely petitioned the Texas Court of Criminal Appeals for discretionary review on May 3, 1982; that Court refused the petition on October 13, 1982, and overruled Mr. Head's timely motion to rehear the

denial, filed on October 28, on November 24, 1982.

Petitioner raised the issues of lack of notice, and consequent denial of due process, in the Texas Court of Criminal Appeals both in his petition for discretionary review and motion for rehearing. See the Appendix, pp. A4, A11, A20.

REASONS FOR GRANTING THE WRIT

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864).

Petitioner was entitled to be heard in his only appeal of right--Texas law makes this clear*--but he was denied

---

*An appellant in a criminal case in Texas enjoys the traditional rights to examine and except to the trial record,

this right because neither he nor his counsel of record was notified when the appeal was set for submission. This failure to give notice denied Petitioner due process of law guaranteed to him by the 14th amendment to the United States Constitution.

This Court more than three decades ago recognized that, if a state affords an appeal of right of a conviction, the appellate procedure must comply with the standards of due process. Cole v. Arkansas, 333 U.S. 196, 201 (1948). Texas appellate procedure with respect to notice does not.

---

submit original and supplemental briefs to the appellate court, appear before that court in person or through counsel, and to argue the appeal orally to the court. See TEX. CODE CRIM. PROC. ANN. arts. 40.09. § 9, 44.33 (Vernon Supp. 1982); TEX. CRIM. APP. R. rule 205 (1981).

Rule 204 of the Texas Rules of Post Trial and Appellate Procedure in Criminal Cases provides in its entirety:*

> Rule 204. NOTIFICATION OF SUBMISSIONS.
>
> The clerk of each court of appeals is directed to use all reasonable diligence to notify counsel of record of all settings in criminal cases, though the failure to receive notice will not necessarily prevent or defeat the submission of the case on the day on which it is set. Within 15 days of the mailing of the notice of the setting, all counsel of record will acknowledge receipt of such notice and advise the clerk whether or not oral argument is desired. Failure to advise the clerk will constitute a waiver of oral argument. Provided, however, that a court of appeals may direct that a particular case be argued orally. [Emphasis added.]

---

*The Texas Rules of Post Trial and Appellate Procedure in Criminal Cases were promulgated by the Texas Court of Criminal Appeals pursuant to TEX. CODE CRIM. PROC. ANN. art. 44.33(a) (Vernon Supp. 1982) and have the force of law.

The clerk of the Dallas Court of Appeals did not notify Mr. Head, Petitioner's counsel of record for the appeal, of the case's setting so Mr. Head had no opportunity to request oral argument. The Dallas Court of Appeals applied the next-to-last sentence of rule 204 to treat Mr. Head's lack of request as a waiver of oral argument, and then applied the second clause of the rule's first sentence to waive his appearance and hear the appeal on the date set without him.* As a result,

---

*Petitioner recognizes that the second clause of rule 204's first sentence is ambiguous: the phrase "will not necessarily prevent or defeat the submission" arguably permits a court of appeals to postpone submission if counsel was not notified. In this case the appeal was submitted when set, although Petitioner's counsel was not notified, so it is immaterial whether the quoted phrase could in another case be interpreted to permit postponing submission.

Mr. Head had no opportunity to obtain and submit a transcription of the testimony at the trial (called a statement of facts in Texas practice), to prepare and submit a brief, or to argue orally before the court. Had Mr. Head been notified, he would have been able to show the Dallas Court of Appeals that Petitioner was denied the effective assistance of counsel at his trial. As it was, the Dallas Court of Appeals noted in its half-page, per curiam opinion affirming Petitioner's conviction that it did so without the benefit of a statement of facts or brief. (Appendix, p. A2.)

This Court in another Texas case struck down as violating due process a Texas law dispensing with notice to an individual before he was deprived of a

fundamental liberty interest. In Armstrong v. Manzo, 380 U.S. 545 (1965), the natural father lost custody of his daughter in a judicial proceeding of which he was given no advance notice and in which he thus did not appear. This Court wasted little time in faulting the lack of notice:

> . . . It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demand of due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, at 311.

Id. at 550.

The respondent in Armstrong argued that any harm resulting from the

original lack of notice was cured when the natural father was granted a rehearing in the trial court that stripped him of custody. This Court disagreed, pointing out that respondent's burden of proof--to establish that the natural father did not contribute to the best of his ability to his daughter's support--shifted on rehearing to the natural father to prove that he did so contribute. This shift in the burden of proof clearly harmed the natural father, because the trial court on rehearing refused to vacate the award of custody to respondent, and it was a harm directly attributable to the failure of Texas law to give him notice of the original proceeding.

The application of criminal appellate rule 204 in the instant case

caused the same kind of harm to Petitioner: He was not given notice of the submission of his appeal to the Dallas Court of Appeals and his motion to that Court to rehear the appeal was overruled without opinion.

It is instructive to contrast the provisions of criminal appellate rule 204 with those of the rules governing notice of submission of civil appeals. Rule 411 of the Texas Rules of Civil Procedure provides:

> Causes on the trial docket of the Court of Civil Appeals which are not advanced as otherwise provided shall be submitted in the order of the date of filing and the clerk shall notify the parties or their attorneys of the date of filing, and of the date of submission, by letter delivered in person or through the mails.

The clerk's duty to notify counsel of the submission date is unqualified under the civil rules.*

The failure of the clerk of the Dallas Court of Appeals to notify Petitioner's counsel of the submission date was no doubt the result of the confusion surrounding that Court's expansion from three to nine judges** pursuant to its receipt of criminal jurisdiction and transformation into a court of appeals. It is likely that, sometime during the 21 months between approval of Petitioner's appellate record and

---

*Rules 21a and 21b of those same civil rules require that service of all notice under the rules be made in person or by registered or certified mail. Certified mail with return receipt requested of course provides a simple and inexpensive method of proving service.

**See TEX. REV. CIV. STAT. ANN. art. 1812 (Vernon Supp. 1982).

the Court's decision on his appeal, parts of that record were misplaced or jumbled. Whatever the reason, however, the lack of notice permitted by rule 204 denied Petitioner the opportunity to participate in his one appeal of right.

CONCLUSION

For the foregoing reasons, a writ of certiorari to the Texas Court of Criminal Appeals should be granted in

Petitioner's case and the judgment entered October 13, 1982, refusing Petitioner's petition for discretionary review, should be reversed.

Respectfully submitted,

Seth S. Searcy III
Counsel of Record

505 W. 14th St.
Austin, TX 78701
(512) 472-3167

Fred Head
Box F.H.
Athens, TX 75751
(214) 675-5111

Attorneys for
Petitioner, Charles
E. Luna

CERTIFICATE OF SERVICE

I certify that on January 20, 1983, I served three copies of this Petition for Writ of Certiorari to the Texas Court of Criminal Appeals on each of the following individuals by depositing the copies in the United States Mail, with first-class postage prepaid, addressed to:

(1) Henry G. Whitley, Esq., Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202.

(2) State Prosecuting Attorney, State of Texas, Box 12405, Austin, TX 78711.

(3) Hon. Jim Mattox, Texas Attorney General, Box 12584, Austin, TX 78711.

Seth A. Searcy III

Seth S. Searcy III

COURT OF CRIMINAL APPEALS
OF TEXAS

Number 0732-82

LUNA, CHARLES E.

VS.

THE STATE OF TEXAS

IN THE 5TH COURT
OF APPEALS

COURT OF APPEALS
NO. 05-81-0117

ORDER

The Appellant's petition for discretionary review in the aboved numbered and entitled cause is refused.

PER CURIAM

Delivered October 13, 1982

Motion for Rehearing denied on
November 24, 1982.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

By: /s/ Sherrie Ericson
Sherrie Ericson
Deputy Clerk

Do not issue your mandate for fifteen (15) days from November 24, 1982.

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-81-01177-CR

CHARLES E. LUNA, APPELLANT	FROM A DISTRICT COURT
VS.	
THE STATE OF TEXAS, APPELLEE	OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES ROBERTSON, STEPHENS AND VANCE
OPINION PER CURIAM
NOVEMBER 12, 1981

Appellant entered a plea of guilty before a jury to the offense of commercial bribery. See TEX. PENAL CODE ANN. § 32.43(b)(1) (Vernon 1974). He was convicted and the jury assessed punishment at confinement for five years.

The record is before us without a statement of facts. No brief has been filed on behalf of the appellant pursuant to TEX. CODE CRIM. PRO. ANN. art.

40.09, § 9 (Vernon Supp. 1980-81). There is no showing of indigency and we find no fundamental error.

The judgment is affirmed.

PER CURIAM

D.N.P.

No. 0732-82

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

Austin, Texas

Charles E. Luna,
Appellant

V.

The State of Texas,
Appellee

PETITION FOR DISCRETIONARY REVIEW

From the Fifth Supreme Judicial Court
of Appeals

Dallas County, Texas

Cause No. 05-81-01177CR

Fred Head
Attorney at Law
Box F.H.
Athens, Texas 75751
Phone 214/675-5111
Bar I.D. No. 0931900
Attorney for Appellant
Charles E. Luna

SUBJECT INDEX

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

Austin Texas

Charles E. Luna, Appellant	X	From the Fifth Supreme Judicial Court of Appeals Cause No. 05-81-001177CR Dallas County, Texas
V.	X	
The State of Texas, Appellee	X	

PETITION FOR DISCRETIONARY REVIEW

To the Honorable Judges of said Court:

Now comes Charles E. Luna, Appellant, in the above entitled and numbered cause and pursuant to Article 44.45(b)(1) Texas Code of Criminal Procedure files this his Petition for Discretionary Review and would show to the Court as follows:

I.

General Statement of the Nature of the Case

The Appellant, Charles E. Luna, was indicted by a grand jury in Dallas County, Texas on March 6, 1979, and on July 13, 1979, was found guilty of the offense of Commercial Bribery, alleged to have been committed on or about the 26th day of January, 1979, and assessed punishment of five (5) years confinement in the Texas Department of Corrections by a jury in Dallas County, this being a violation of Article 32.43 Texas Penal Code, a statute under which a case concerning violation thereof has not yet reached the Texas Court of Criminal Appeals, although having been enacted by the Texas Legislature as a part of the new Penal Code in the year

of 1973 and effective January 1, 1974. On August 17, 1979, Appellant was sentenced to serve a term of not less than two nor more than five years in the Texas Department of Corrections. Notice of Appeal was given in open Court on that date. The Fifth Supreme Judicial Court of Appeals at Dallas, Texas, affirmed by Per Curiam Opinion on November 12, 1981.

II.

Statement of the Procedural History of the Case

Date	Action taken
11-12-81	Court of Appeals affirmed Judgment of Trial Court by Per Curiam Opinion.
11-30-81	Motion for Rehearing filed by Appellant Charles E. Luna.
12-9-81	Motion in Opposition to Appellant's Motion for Rehearing filed by the State.

Date	Action taken
1-27-82	Motion to Continue Rehearing filed by Appellant Charles E. Luna.
1-27-82	Pauper's Oath for Appeal filed by Appellant Charles E. Luna.
1-27-82	Application for Out of Time Appeal and Extension of Time filed by Appellant Charles E. Luna.
1-27-82	Answer to State's Motion in Opposition to Appellant's Motion for Rehearing filed by Appellant Charles E. Luna.
1-27-82	First Amended Motion for Rehearing filed by Appellant Charles E. Luna.
3-1-82	Order of the Fifth Court of Appeals Overruling Appellant Charles E. Luna's Motion to Continue Rehearing.
3-31-82	Order of the Fifth Court of Appeals Overruling Appellant Charles E. Luna's Motion for Rehearing.

III.

Grounds for Review

1) No case decided by the Texas Court of Criminal Appeals under Article 32.43 of the Texas Penal Code, the Commercial Bribery Statute.

2) Trial Court Judge (The Honorable Herbert Line) heard the trial of the case through retirement of the jury for deliberation and then left the bench, allowing the substitution of another Judge (The Honorable Ed Gossett) at a very important juncture in the trial thereby denying the Appellant Charles E. Luna the valuable right of having the Judge who heard all the testimony in the trial to also rule on the question of granting probation to Appellant, this causing injury to Appellant.

3) Trial Court failed to rule on Motion to Reopen the case.

4) Trial Court failed to hold hearing on the question of indigency and rule thereon.

5) Trial Court failed to notify Appellant that the cause was being sent to the Court of Appeals.

6) Fifth Court of Appeals failed to notify Fred Head, Counsel for Appellant, that said Court had this cause under consideration.

7) Fifth Court of Appeals failed to notify Fred Head, Counsel for Appellant, that said Court had set this cause for submission.

8) Fifth Court of Appeals failed to notify Fred Head, Counsel for Appellant, of the date and time this cause was set for submission.

9) Fifth Court of Appeals failed to allow Fred Head, Counsel for Appellant, to orally argue this cause, a matter of right under Article 44.33 of the Texas Code of Criminal Procedure.

10) Fifth Court of Appeals failed to hold a hearing and rule on the question of indigency of the Appellant (or return the case to the Trial Court for it to hold a hearing and rule) after Affidavit of Indigency filed.

11) Fifth Court of Appeals failed to grant Out of Time Appeal of this cause, to grant Extension of Time, and to allow the record to be supplemented so that the record would speak the truth. In fact, the Fifth Court of Appeals has failed to rule at all on Appellant's Motion for Out of Time Appeal and Extension of Time.

12) Fifth Court of Appeals failed to grant Motion for Rehearing, correct other matters complained of above, and resubmit this cause for rehearing with a full and complete record that speaks the truth and upon required oral argument.

IV.

Reasons for Review

A. Rule 302(c)(2) "Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals;"

This cause and Appellant's ground or error number 1) above state fall squarely within the language of Rule 302(c)(2) of the Rules of the Court of Criminal Appeals pertaining to Discretionary Review in General. Article

32.43 of the Texas Penal Code, the Commercial Bribery Statute, enacted in 1973 and effective January 1, 1974, and the interpretation of said statute by the courts certainly contain important questions of state law. Counsel for Appellant Charles E. Luna has made a diligent search and has found that the Texas Court of Criminal Appeals has not yet decided a case under the said Article 32.43. Since the Fifth Court of Appeals has now decided this cause under said Article 32.43 in a proceeding containing numerous questions in the trial court as well as the Fifth Court of Appeals, the Court of Criminal Appeals should settle these questions by granting discretionary review, requiring the correction of errors of the trial court and the Fifth Court of

Appeals, and then, if necessary, writing on this case based on a full and complete record and the required oral argument.

B. Rule 302(c)(6) "Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision."

Without restating the above grounds of review, Appellant would point out to the Court that his grounds of review numbers 2) through 12) above stated fall primarily under Rule 302(c)(6) of the Rules of the Court of Criminal Appeals pertaining to Discretionary Review in General, but might also be considered by the Court of Criminal Appeals to be

reviewable under Sections (3) and (4) of the said Rule 302(c).

It seems apparent to Counsel for Appellant that the failures by the trial court and the Fifth Court of Appeals to give notice to Counsel for Appellant when notice was required, to hear matters that should have been heard, to allow oral argument when oral argument was required, and to rule on matters requiring a ruling clearly invoke the power of supervision of the Court of Criminal Appeals and clearly state a case requiring discretionary review by said Court. Therefore, Counsel for Appellant has not felt the necessity to cite case authorities under Sections (3) and (4) of Rule 302(c) or otherwise in this petition but will do so in Appellant's Brief.

V.

Prayer for Relief

Wherefore, premises considered, Appellant Charles E. Luna respectfully prays the Texas Court of Criminal Appeals to grant discretionary review in this cause and that upon review the decision of the Fifth Court of Appeals affirming the trial court be reversed and the cause returned to the Fifth Court of Appeals with instructions to said Court to abate the appeal, grant an extension of time for filing a full and complete record of the case including a statement of facts so that the record will speak the truth, and return the cause to the trial court for said trial court to hold a hearing on and determine the question of indigency of the Appellant. Appellant further prays

that said trial court be instructed to grant a free record of the case to Appellant if he is found to be indigent and that the trial court be instructed to rule on Appellant's Motion to Reopen the case. Appellant still further prays this Court to instruct the Fifth Court of Appeals to rehear this cause based on a full and complete record and the required oral argument after proper notice.

Respectfully submitted,

/s/ Fred Head

Fred Head
Attorney at Law
Box F.H.
Athens, Texas 75751
Phone 214/675-5111
Bar I.D. No. 09319000

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Discretionary Review has been served on Mr. Henry G. Whitley, Attorney for the Appellee, The State of Texas, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, by depositing same in the United States Mail, Postage Prepaid, on this the 3rd day of May, 1982.

/s/ Fred Head
Fred Head

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

Austin, Texas

Charles E. Luna, Appellant	I	From the Fifth Supreme
	I	Judicial Court
V.	I	of Appeals
	I	Cause No. 05-81-001177CR
The State of Texas, Appellee	I	Dallas County, Texas

Motion for Rehearing

To the Honorable Judges of Said Court:

Charles E. Luna, Appellant, files this his motion for rehearing and as grounds therefor would show the Court as follows:

Appellant was denied due process because his counsel of record was not timely notified of the submission of his case to the Court of Appeals in Dallas. Because of this lack of notice, Appellant's counsel was unable to obtain a

statement of facts, to prepare and submit a brief, or to argue the case in person before the Court. Had counsel been timely notified, he would have been able to show the Court of Appeals that Appellant was ineffectively represented by trial counsel.

This Court should grant Appellant's Petition for Discretionary Review and examine the record in this case. The record will show that Appellant was a casualty of the confusion surrounding the transfer of criminal jurisdiction to the former courts of civil appeals. Although the confusion was probably inevitable, it should not be allowed to deny Appellant the opportunity to participate effectively in his one appeal of right.

Wherefore, Appellant prays the Court to rehear his Petition for Discretionary Review and grant the relief requested therein.

Respectfully submitted,

/s/ Seth S. Searcy III
Seth S. Searcy III
Attorney at Law
505 W. 14th Street
Austin, Texas 78705
(512) 472-3167
State Bar No. 17955000

/s/ Fred Head
Fred Head
Attorney at Law
Box F.H.
Athens, Texas 75751
(214) 675-5111
State Bar No. 09319000

Attorneys for Appellant
Charles E. Luna

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Rehearing has been served on Mr. Henry G. Whitley, Attorney for the Appellee, The State of Texas, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and State Prosecuting Attorney, P.O. Box 12405, Austin, Texas, 78711, by depositing same in the United States Mail, Postage Prepaid, on this the 28th day of October, 1982.

/s/ Seth S Searcy III
Seth S. Searcy III

/s/ Fred Head
Fred Head

FRED HEAD
Attorney & Counselor
Box F H
Athens, Texas 75751
Telephone (214) 675-1600

January 29, 1980

The Honorable Judge Thomas B. Thorpe
203rd Judicial District Court
Dallas County Courthouse
Dallas, Texas

Dear Judge Thorpe,

In accordance with our recent telephone conversation, this letter will confirm that I am to be listed and considered as attorney of record for Charles E. Luna in State of Texas vs. Charles E. Luna, No. F79-2400-).

Sincerely yours,

/s/ Fred Head

Fred Head

FH:ch
cc:

Mr. Jon Sparling
Mr. Bill Shaw
Mr. Robert Hinton

NO. 82-1235

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

CHARLES E. LUNA,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DOUGLAS M. BECKER
Assistant Attorney General
Acting Chief, Enforcement Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281
Attorneys for Respondent

QUESTION PRESENTED

Whether Petitioner was denied due process of law because Rule 204, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, permitted submission and disposition of his appeal by a court of appeals without notification to his counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 82-1235

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CHARLES E. LUNA,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this Brief in Opposition.

OPINION BELOW

On November 12, 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas issued a per curiam opinion affirming Petitioner's conviction. (Appendix A-2 to the petition). The Texas Court of Criminal Appeals denied Petitioner's petition

for discretionary review without a written opinion on October 13, 1982 (Appendix A-1 to the petition), and overruled his motion for rehearing on November 24, 1982. (*Id.*)

JURISDICTION

Petitioner correctly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's claim is based on the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On July 13, 1979, Petitioner was convicted of the felony offense of commercial bribery after a jury trial on his plea of guilty in the 203rd District Court of Dallas County, Texas. He was represented during his trial by a retained attorney, Robert Hinton. Petitioner was sentenced on August 17, 1979, to five years imprisonment in the Texas Department of Corrections and gave notice of appeal on the same date.

On January 10, 1980, Petitioner retained Fred Head as counsel on appeal. After the trial court was notified of this change, the court sent Mr. Head a letter informing him that notice of appeal had been given and that no arrangements had been made concerning preparation of the statement of facts and transcript for appeal. In this letter, the trial court also arranged a setting on February 28, 1980, for a hearing which Mr. Head desired, but made clear the intention of the court that the appeal be processed unless an extension was granted by the Court of Criminal Appeals. At the February 28 hearing, Mr. Head agreed to submit a formal motion to reopen to be heard on April 2, 1980, and to file a motion

for extension of time in the Court of Criminal Appeals. The trial court sent Mr. Head a letter confirming the agreement on March 4, 1980. Subsequently, the record fails to reflect that Mr. Head filed either of these motions or that he appeared at the April 2 setting.

On June 5, 1980, the trial court ordered that the record on appeal be transmitted to the Court of Criminal Appeals. The Court of Criminal Appeals, however, returned the record because while the record had been approved on February 21, 1980, the record did not indicate that the parties were notified of the approval. The parties were then notified on July 10, 1980.

In November, 1980, Texas amended its constitution to add criminal jurisdiction to its intermediate appellate courts. This amendment took effect on September 1, 1981. On November 4, 1981, the trial court sent the record on appeal to the Court of Appeals for the Fifth Supreme Judicial District in Dallas in accordance with the September 1, 1981, amendment. The Court of Appeals affirmed Petitioner's conviction on November 12, 1981. After Mr. Head learned of the Dallas court's decision he filed numerous requests for rehearing and other relief. On December 11, 1981, almost two years after Mr. Head was notified that no statement of facts had been ordered, he made his first effort to secure a statement of facts from the court reporter.

Although Petitioner filed a petition for discretionary review in the Court of Criminal Appeals, he did not claim that he was denied due process of law by operation of the Texas statute until his motion for rehearing of the denial of that petition.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the issue presented.

Petitioner has not properly presented the issue raised herein to the Texas Court of Criminal Appeals; therefore, this Court is without jurisdiction to grant the writ of certiorari.

The rule of appellate procedure of which Petitioner complains did not deny him due process of law.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

S.Ct.R. 17 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exists.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIM BECAUSE IT WAS NOT PROPERLY PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Although Petitioner stated in his petition for discretionary review before the Texas Court of Criminal Appeals that the Fifth Court of Appeals failed to notify his counsel of the submission of his appeal, he did not argue that this failure denied him due process of law until he filed a motion for rehearing of the denial of his petition. "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *See also, Bloeth v. New York*, 369 U.S 133 (1962). Since Peti-

tioner complains of a procedure used by the intermediate appellate court, a motion for rehearing in the highest appellate court was clearly *not* Petitioner's first opportunity to raise his claim. Petitioner could and should have raised his claim in the first pleading filed in the Texas Court of Criminal Appeals, his petition for discretionary review, rather than in his motion for rehearing filed in that court. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962). Since Petitioner's claim was not raised until motion for rehearing in the Court of Criminal Appeals and since the Court of Criminal Appeals denied rehearing without explanatory comment, this Court is without jurisdiction to consider Petitioner's claim. *Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978).

III.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY OPERATION OF RULE 204, TEXAS RULES OF POST TRIAL AND APPELLATE PROCEDURE IN CRIMINAL CASES.

Petitioner contends that his attorney had no opportunity to obtain and submit a statement of facts, to prepare and submit a brief, or to argue orally before the court because Rule 204, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, provides that failure of counsel to receive notice of submission will not necessarily defeat submission of the case. The record reflects, however, that Petitioner's counsel had adequate and fair notice that the appeal was being processed and had ample opportunity to obtain a statement of facts and prepare and submit a brief.

Petitioner's counsel, Mr. Fred Head, was first notified on February 12, 1980, that no arrangements had been made to obtain a statement of facts and that the trial court intended that the appeal be processed promptly unless Mr. Head obtained an extension of time from the Court of Criminal Appeals to obtain a statement of facts.[1] Mr. Head made no effort to order a statement of fact from the court reporter or to obtain an extension of time. Mr. Head again received notice that the appeal was being processed when he received notice of approval of the record on appeal on July 10, 1980. Under the rules then in effect, Mr. Head had thirty days after notice of approval of the record was mailed to file a brief. Tex. Code Crim. Proc. Ann. art. 40.09(9). He failed to file a brief or make any other effort to perfect Petitioner's appeal even though he had ample opportunity to do so. The failure of Petitioner's case to be presented on appeal[2] occurred not because Texas rules of appellate procedure failed to give the notice required by due process, but because Petitioner's counsel failed to make use of the orderly procedure provided for by Texas law. The contrast, both substantially and procedurally, to *Armstrong v. Manzo*, 380 U.S. 545 (1965), is obvious. It would be more appropriate for Petitioner to file a state writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 alleging ineffective assistance of counsel on appeal to obtain an out-of-time appeal rather than challenge Rule 204 as a denial of due process.

---

1. Tex. Code Crim. Proc. Ann. art. 40.09(2) provides that the party who desires to include a statement of facts in the record on appeal has the responsibility of obtaining such transcription from the court reporter.

2. Since Petitioner pleaded guilty, it is difficult to imagine that basis for the appeal he has sought. He suggests he might have shown that he "was denied the effective assistance of counsel at his trial." (Petition at 12). Although this ground might provide a basis for post-conviction relief, it is difficult to perceive how a guilty plea transcript might reflect such incompetence.

(footnote continued on following page)

CONCLUSION

For the above reasons, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DOUGLAS M. BECKER
Assistant Attorney General
Acting Chief, Enforcement
Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

(footnote continued from previous page)

In the Texas Court of Criminal Appeals, Petitioner stated that his case should be reviewed because that court had never construed the statute under which he was convicted and because the judge who presided over the punishment phase of his trial was not the same judge who had heard his guilty plea. He raised no question of the validity or construction of the statute, however; and it was a jury, not the judge, that denied his application for probation and assessed punishment at five years confinement.